No. 4571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiffs in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

CLOSING BRIEF FOR PLAINTIFFS IN ERROR

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THE FACTS

We can not help observing that the United States Attorney in his brief has made several mistakes as to the evidence.

Referring to the witness Cory, on page 4, counsel says:

> "As witness entered he saw Webb standing at the rear of the bar, and he made some motion with his hands."

However, on cross-examination of the witness it was developed that the witness did not see Webb "make some motions with his hands"; that all he saw Webb do was to put his hands beneath the bar. As Webb was the bartender, there was nothing at all suspicious or remarkable about that.

The Government brief then recites that the witness Cory took samples from the barrels which were found in the basement and had them analyzed; and they were found to contain 3.94 per cent of alcohol. (p. 8.) The witness indeed so testified but his statement was

shown to be untrue by other witnesses for the Government.

> CORY: I took samples from the barrels and had them submitted to the city chemist to be analyzed, and it was found that they contained 3.94 per cent of alcohol.
>
> MR. JOHNSON: We offer it for identification at this time. (Trans., p. 32.)
>
> FELT: I went behind the bar. I found some high proof beer there. It is the same that is admitted in evidence. That is the bottle there. (Trans., p. 48.)
>
> AFLECK: I made an analysis of the sample of liquor handed me and found it contained 3.94 per cent of alcohol by volume. (Trans., p. 38.)

There was only one sample of beer admitted in evidence and that was positively identified by Felt as the bottle which he had taken from behind the bar. The same bottle was said by Cory to be one he had taken from the basement.

Another mis-statement of the evidence deserves attention. Referring to Camplong's testimony, counsel says on page 7 of his brief:

> "As witness was going out of the door leading to the basement at the back end of the bar, he noticed a man going out of the kitchen door."

There was no basement at the back end of the bar, except the basement that extended the entire length of the building. The door the witness referred to was at least sixty feet from the bar; and the intervening space and the kitchen was occupied by persons not here concerned.

Camplong on direct examination did say that he saw Larke come out of the kitchen door; but on cross-

examination was compelled to admit that his testimony in this respect was false.

> CAMPLONG: From where I was standing in the basement, it was impossible to see the kitchen door. I assumed he came out of the kitchen door. (Trans., p. 45.)

THE SPECIFICATIONS OF ERROR.

The Government's brief displays the same lack of accuracy in dealing with the specifications of error.

Our first specification is as follows:

> "The information is so defective as to be wholly void. Consequently the court below never acquired jurisdiction, and the motion in arrest of judgment should have been granted."

Speaking of this specification, counsel says:

> "The particular objection of the plaintiffs in error to the information, however, results from the apparent circumstance that a certain portion of the usual affidavit filed with such information appears to have been misplaced in the document so that it appears previous to the signature of the United States Attorney. Following the signature there is a portion of the affidavit referring to the third count, which standing alone, might not be considered complete. It is not clear whether the signature of the United States Attorney instead of being placed at the end of the information proper, was inadvertently placed on a portion of the affidavit attached to the information; or, whether after the signing of the information, a portion of the affidavit was inadvertently placed so as to appear in the wrong place."

I do not think counsel will dispute our statement of the fact that this information and the affidavits are made upon the regular forms used by the United States Attorney in these cases. Consequently it would

have been impossible for a portion of either to have been misplaced, without the use of shears.

The information with the affidavits appears in the transcript on pages one to eight, inclusive. The information ends on page five with the usual language: "Contrary to the form of the statute of the United States of America in such case made and provided." There is no signature at all to this information. Following, there is a garbled form of affidavit made by no one, apparently relating to the first and second counts, and not sworn to before any officer. On this form, the signatures of Sterling Carr and Gerald R. Johnson, appearing in the place for the name of the affiant and the jurat of the officer, having no meaning or relevancy. There follows an affidavit, relating to the third count, sworn to and subscribed by I. H. Cory. This affidavit is complete in itself, and has no bearing on the first or second counts; but in connection with the information and proof has two grave defects. It is purely hearsay, as was demonstrated during the trial, for Cory was not present at the time of the alleged transaction related therein, and had no personal knowledge of the alleged sale of whiskey. Furthermore, it attempts to state an offense, different from that charged in the third count. The third count charges defendants simply with the sale of whiskey; the affidavit relates that they maintained a nuisance:

> "That they did then and there maintain a common nuisance in that said defendants did then and there sell on the premises aforesaid certain intoxicating liquor, to-wit: 2 drinks of whiskey, etc., ..." (Trans., p. 8.)

There is no particular discrepancy in the Govern-

ment's brief as to the form of our second specification of error; but there is a rather astonishing statement in regard to the manner and time of the motion to suppress the evidence. Counsel affects to regard the motion as having been made during the trial. The transcript sufficiently shows that the motion was made before trial and at the earliest time it could have been heard. (Trans., p. 11.)

In regard to our third specification of error counsel again indulges in inaccuracy. He appears to think that the motion referred to in the third specification related only to the liquor found in Larke's grips; but the motion was to strike out all of the evidence concerning liquor obtained by illegal search and seizure, by the search of the bar, the basement and any other part of the building, as well as by the search of Larke's effects.

ARGUMENT.

I.

Our objections to the information are not made on the ground that it is not signed, nor on the ground that it is not verified. The objections are that it is neither signed nor verified; and that while it purports to be based upon and made certain by affidavits, there are no affidavits to the first or to the second counts; and that the affidavit to the third count is hearsay, and therefore not an affidavit at all, and states some offense different from that charged in the third count.

An information may be made upon the official oath of the United States Attorney, without verification, but

if not so made, and expressly purports to be based upon affidavits, it is not sufficient unless the affidavits themselves can be considered sufficient to support the charge.

U. S. vs. *Schallinger Prod. Co.*, 230 Fed. 290.

Where an information is calculated to leave in doubt the mind of a defendant as to the exact nature of the crime attempted to be charged against him, it is defective, and such a defect can be first raised by motion in arrest of judgment.

U. S. vs. *Craig*, 1 Fed. (2nd) 482.

Lately in the District Court at San Francisco, the Hon. John S. Partridge severely condemned a practice similar to the filing of an information based purely on a hearsay affidavit. In the case of *United States* vs. *Antone Brasti*, on a motion for a bill of particulars heard on July 11th, 1925, the learned judge denounced the making of complaints and affidavits by use of fictitious names, in language entirely applicable here, saying: "Every person accused of crime should be faced in court by his accuser." "How can a man make a defense if he is accused by a person giving a fictitious name?"

Similarly, how could these defendants prepare a defense against an accusation by Cory, when the proof would be that the sale was to Felt?

It is idle for the United States Attorney to quote to us Section 1025 of the Revised Statutes, under which he says, defects of form can not be availed of after judgment. Since the objection to the information was

raised by motion in arrest of judgment, his argument does not meet the situation.

U. S. vs. *Craig, supra.*

Ruling on motion in arrest of judgment for defects apparent on face of record may be assigned as error.

Houston vs. *United States*, 2 Fed. (2nd) 497, citing 2 Bishop's New Criminal Procedure, ch. 87.

Blitz vs. *United States*, 153 U. S. 308, 38 L. Ed. 725.

The cases cited by the United States Attorney, *Miller* vs. *U. S.*, 300 Fed. 529, and *Frisbie* vs. *U. S.*, 157 U. S. 160, obviously do not apply here, for on his own statement they relate to indictments, not to informations.

II.

Counsel rather forcibly takes the position in regard to the evidence obtained by the search of Larke's grips that the motion to suppress such evidence could be made only by Larke as he was the only one of the defendants whose personal rights were so infringed. Standing alone that point might be well taken, although his argument is vitiated by the inaccuracy as to the facts displayed throughout his brief. He says: "When officers go to a place of business with a search warrant to search the place and they see a bystander going surreptitiously from the back door with a grip to a neighboring garage or building and follow and see him endeavoring to conceal the very thing sought to be found then it is clear that the offi-

cers have a right to intercept his actions and seize the articles." Now the officers if they had a warrant at all had only a warrant to search the Commercial Bar; the kitchen was not part of the Commercial Bar—it was under the control of persons not here at all interested. The officers did not see Larke come out of the back door, the officers did not see Larke attempting to conceal the very thing sought to be found; all the officers saw Larke do was as related in Camplong's testimony—"He was carrying a handbag and went into the garage and I went out the back end of the garage and heard the clinking of bottles and I looked through a crack in the garage and saw him placing some bottles in the bag." Mr. Cory did not see Larke do anything; he says: "Mr. Larke was standing there and had a couple of grips in his hands. Mr. Camplong told me at that time in the presence of Mr. Larke, 'I have got the stuff.' He said to Larke, 'Let me see what you have in your grips.' Larke said, 'Have you got a search warrant?' "

And it must be remembered that if the agents had any search warrant at all, according to their testimony, that search warrant simply covered the Commercial Bar and when during the course of the trial it was developed that the officers had used unlawful means to affect the search and had proceeded in an unlawful manner, then the motion to suppress the evidence obtained by the unlawful search of Larke's grips was renewed and was joined in by all of the defendants on the ample ground urged in behalf of all of them—that the search and seizure was illegal.

Giles vs. *U. S.*, 284 Fed. 208.

Boyd vs. *U. S.*, 116 U. S. 616.
29 Law Ed. 746.
Amos vs. *U. S.*, 65 Law. Ed. 654.

III.

In regard to the motion to strike out evidence concerning all of the liquors obtained by the illegal search and seizure which is the basis of our third specification of error, we have noted above that counsel for the Government have not set forth accurately the circumstances under which the motion was made. For some reason we are unable to understand counsel's persistence in saying that there was no reason why the motion could not have been made before the trial. Under the authorities to which we refer in our opening brief the motion was made at the proper time, under the proper state of the evidence; there was no dispute as to the manner in which the search was conducted. The evidence given by the agents themselves shows that the search and seizure was illegal and we hope after consideration of those authorities, Government's counsel may be able to understand that there was no collateral issue presented by the motion, consequently the authorities cited by the Government do not apply. In the case of *Souza* vs. *U. S.*, 5 Fed. (2nd) 9, two years had elapsed. The evidence relating to the search and seizure was conflicting. *McDonough* vs. *U. S.*, 294 Fed. 769, is as far as possible from a parallel to the present case. There the motion related to conflicting evidence as to whether or not a sale had been made in a dwelling house, so as to justify search under a warrant. *Adams* vs. *N. Y.*, 192 U. S. 585, 48

Law. Ed. 575, was a case arising under the laws of the State of New York, and the only point remotely in interest was the constitutionality of the New York law and the case could have no bearing here for it is well known that the Courts of the various States do not give the same interpretations to the constitutional measures relating to searches and seizures as do the Courts of the United States. There is no dispute made in the Government's brief as to the existence of the facts disclosed by the evidence and which go to show the illegality of the search and seizure. Counsel does not deny that the Government officers went outside of the place described in the warrant; there was no pretense that the alleged search warrant was ever shown to anybody; there is no pretense that a copy of the alleged search warrant was given to anybody at the place searched or even left there. There was no contention in the Government's brief that a receipt for the articles seized was given to anyone; there was no dispute that the search under the alleged warrant was nothing more than a mere fishing expedition, there being no pretense that the agents knew of the existence that the beer found in the basement, or of the liquors found in Larke's grips. Curiously enough counsel's own language in his brief brings the matter squarely within the rule laid down in *Hagan* vs. *U. S.*, 5 Fed. (2nd) 965. The brief says, page 15: "There is nothing in the record to show the connection of the search warrant under which the agents were operating. There is merely the statement of agent Camplong, Transcript, page 28, 'We had a search warrant for the place.'" Now in the case just cited the

Court said the failure to produce the warrant and vagueness of testimony as to its terms require the assumption that the warrant was insufficient and the seizure illegal.

Hagan vs. *U. S., supra.*
Garske vs. *U. S.*, 1 Fed. (2nd) 620.

We do not believe that counsel can really be satisfied by his argument; at any rate there is no effort on his part to dispute the applicability of the authorities recited in our opening brief.

The Government is required to justify search and seizure.

U. S. vs. *Kelliher*, 2 Fed. (2nd) 935.

Search warrants and places thereon must be strictly legal.

Giles vs. *U. S., supra.*
Boyd vs. *U. S., supra.*
Amos vs. *U. S., supra.*
People vs. *Castree*, 143 N. E. 112.
Murby vs. *U. S.*, 293 Fed. 849.

Carroll vs. *U. S.* does not apply. That is the well known case holding that officers may search automobiles under certain suspicious conditions.

IV.

The fourth specification of error relates to hearsay evidence given in the absence of the defendant, Brooks. We think we have fairly stated the grounds and authoritis sufficient to show that the reception of this evidence over the objections of Brooks were error, and

under the authorities cited we believe that the effect of this testimony could not be curd by only admonition of the court directing the jury not to consider it in relation to the defendant Brooks. If there be a conflict between the rule of the State Court and the rule of the Federal Court, we beg to suggest that the rule of the State Court is the better and more conducive to fairness in the administration of justice.

V.

As to our fifth specification in regard to the motion for a directed verdict, the writer must confess an inexcusable blunder in the preparation of the transcript. Being more familiar with the State practice than with Federal procedure, the writer in preparing the Bill of Exceptions omitted to make the bill show that a motion for a directed verdict was made and exception taken to the ruling of court denying the motion. We believe, however, that in the interest of justice the Court should consider the absolute lack of any real evidence against Brooks and we think that his conviction was indeed a miscarriage of justice. Counsel for the Government by the considerable space which he devotes to discussion of the evidence seems to concede that the circumstances should be considered. There is nothing in the evidence that shows Brooks sold any liquor or had possession of any liquor or maintained the premises as a place for the barter of liquor and keeping the same for sale. There is nothing that counsel says in his brief that adds a single circumstance of any moment to the facts which we discussed in our opening brief, although counsel affects to find

great significance in the arrangement of the premises and particularly dwells upon the presence of a large tank underneath the bar and he says: "It was evidently intended to permit the rapid dumping and destruction of small quantities of contraband intoxicating liquor as the parties may have had behind the bar, although defendants undertook to show that this vat was designed to catch the dripping of an ice cream freezer or ice box, this was denied by the agents and their denial found credence with the jury so that the denial was an additional badge of guilt." We plainly say that we consider all of the testimony in regard to this tank and all of the argument concerning the same as fantastic, for it would have been much simpler for these defendants if they wished to dump intoxicating liquor to allow it to run down an ordinary sink and into an ordinary sewer instead of dumping it into a one thousand gallon tank in such a manner that the odors of intoxicating liquor would be constantly diffused through the atmosphere and attract attention of prohibition agents.

While we are discussing this phase of the case we must ourselves admit a mistake of the fact which we made in our opening brief; there we said that there was no evidence that Webb was employed by Brooks, but we find on re-examination of the transcript, after reading the Government's brief, that Webb himself testified that Brooks was his employer, and since we called attention to so many inaccuracies on the part of the Government's counsel we think it just that we should confess one on our own part.

VI.

Our sixth assignment of error dwells with the conduct of the United States Attorney during the trial. There is no dispute as to the fact that during the course of his argument Mr. Johnson said: "Mr. Brooks was not called, but you heard from Mr. Webb what he had to say." That this was error, all of the authorities agree, although some of the decisions hold that the error may be cured by the immediate reprimand of the offending counsel and by immediate admonition to the jury to disregard entirely such a remark. We believe that we have set forth ample authority to the effect that such an error is incurable, and we are equally certain that if not, under the authorities holding the contrary, no proper action was taken by the court to bring itself within the rules laid down in some Courts that the error can be cured.

We still find after exhaustive search of all the cases that *Wilson* vs. *U. S.*, 149 U. S. 60, is the closest parallel and under the authority of that case the judgment against these defendants must be reversed.

> "The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to prejudice the jury and this effect should be corrected by setting the verdict aside and awarding a new trial."
>
> *Wilson* vs. *U. S., supra.*

There is no answer for counsel to say that it may be assumed that the court thereafter properly instructed the jury. The error is not curable by an instruction

given hours later or perhaps several days later. It could only be mitigated by the prompt reprimand and the prompt admonition, which some Courts hold may correct the error and save the rights of the defendant.

We again draw attention to the case of *Wilson* vs. *U. S., supra.* That case is exactly similar not only as to the remarks of the court and counsel but to the state of the record. In the Wilson case the record shows that the exception was taken to the remarks of the United States Attorney and the Supreme Court held that the exception was properly taken so as to bring up the record.

We have made a careful examination of the case of *McDonough* vs. *U. S.* relied on here by the Government and find nothing applicable in the McDonough case. Counsel there did not violate the constitution nor the statute which prohibit reference being made to failure of defendant to come forward as a witness. The only remarks made by counsel in the McDonough case to which exception could be taken were somewhat picturesque and rather outside of the evidence. Government's counsel told the jury that it could be anticipated that in the event of McDonough's acquittal some spectacular festivities would be held by the denizens of what he called the tenderloin of San Francisco and that McDonough would be re-crowned king thereof. Although the Court held that this language was improper, it could not be considered a reversible error and this brief statement shows that counsel's reference to the McDonough case went very far afield, and may

be considered as a confession that he can find no authority to support his own contention.

Of course we could prolong this brief interminably by citations from numerous cases and authorities that it is error to comment upon the fact that defendant did not come forward to testify in his own behalf. We assume the rules in relation to this principle of law are well known to this Honorable Court.

In closing we can only say this case is one of extreme importance to the defendants and we are sure the Court will consider every argument we have made and all of the authorities cited.

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